Supreme Court, U.S.
FILED

97 1074 DEC 29 1997

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

October Term, 1997

PETER VERNIERO, Attorney General of New Jersey, *et al.*,

Cross-Petitioner,

v.

W.P., *et al.*, Individually and as Representatives of a Class Pursuant to Fed.R.Civ.P. 23(a) and 23 (b)(2),

Cross-Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

PETER VERNIERO
Attorney General of New Jersey
Counsel of Record
Hughes Justice Complex
25 Market Street
Trenton, New Jersey 08625
(609) 292-4925

JOSEPH L. YANNOTTI
Assistant Attorney General

RHONDA S. BERLINER-GOLD
B. STEPHAN FINKEL
Deputy Attorneys General
On the Brief

Attorney for Cross-Petitioner

26 pp

QUESTIONS PRESENTED

I. Whether the Third Circuit erred in holding that the federal Due Process Clause requires New Jersey to provide sex offenders registered under Megan's Law with a hearing at which the State bears the burden of proof and must establish the relative degree of risk of reoffense by clear and convincing evidence, which conflicts with the procedures established by the Supreme Court of New Jersey based upon that court's due process analysis.

II. Does the recognition by the Supreme Court of New Jersey of a liberty interest in privacy and reputation under New Jersey's Constitution represent a state-created liberty interest that may not be deprived without compliance with federal due process principles, thereby allowing a federal court to second-guess and supplant procedural protections established by New Jersey to further its State constitutional doctrine of fundamental fairness?

PARTIES TO THE PROCEEDING

In addition to those listed in the caption to the case, which appears on the cover of this cross-petition, the parties to the proceeding also consist of the following, all of whom were also defendants-appellees below and are respondents before this Court:

Jeffrey S. Blitz, Atlantic County Prosecutor;
Charles R. Buckley, Acting Bergen County Prosecutor;
Stephen G. Raymond, Burlington County Prosecutor; Joseph F. Audino, Acting Camden County Prosecutor;
Stephen D. Moore, Cape May County Prosecutor;
Neil S. Cooper, Acting Cumberland County Prosecutor;
Clifford J. Minor, Essex County Prosecutor;
Harris Y. Cotton, Gloucester County Prosecutor;
Carmen Messano, Hudson County Prosecutor;
Sharon B. Ransavage, Hunterdon County Prosecutor;
Maryann K. Bielamowicz, Mercer County Prosecutor;
Robert W. Gluck, Middlesex County Prosecutor;
John Kaye, Monmouth County Prosecutor;
W. Michael Murphy, Jr., Morris County Prosecutor;
Daniel J. Carluccio, Ocean County Prosecutor;
Ronald S. Fava, Passaic County Prosecutor;
Ronald a Epstein, Salem County Prosecutor;
Melaine B. Campbell, Acting Somerset County Prosecutor;
Dennis O'Leary, Sussex County Prosecutor;
Edward Neafsey, Acting Union County Prosecutor;
John J. O'Reilly, Warren County Prosecutor.

By virtue of consolidation of two separate cases by the court of appeals, an individual designated "E.B." (a fictitious name) was also a party to the proceedings below as plaintiff-appellant. "E.B." did not petition for a writ of *certiorari*.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF CITATIONS iv

OPINIONS BELOW. 1

STATEMENT OF JURISDICTION. 1

CONSTITUTIONAL PROVISIONS INVOLVED. 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE. 2

REASONS FOR GRANTING THE WRIT 10

I. This Court Should Resolve the Conflict Between the Court of Appeals and the Supreme Court of New Jersey Regarding the Burden of Persuasion and Standard of Proof Required by Due Process in a Megan's Law Hearing 10

II. This Court Should Consider the Important Question of Whether a Liberty Interest for Which the Due Process Clause of the State Constitution Requires Procedural Protection Automatically Triggers Application of the Procedural Requirements of the Fourteenth Amendment 14

CONCLUSION. 19

TABLE OF CITATIONS

Page

Cases Cited:

Addington v. Texas,
441 U.S. 418 (1979) 13

Alan A. v. Verniero,
970 F.Supp. 1153 (D.N.J. 1997). 7

Board of Regents v. Roth,
408 U.S. 564 (1972). 16

Cleveland Bd. of Educ. v. Loudermill,
470 U.S. 532 (1985). 16

County of Los Angeles v. Davis,
440 U.S. 625 (1979). 17

Doe v. Poritz,
662 A.2d 367 (N.J. 1995) 4,5,6,11,13,15,18

E.B. v. Verniero,
119 F.3d 1077 (3d Cir. 1997) . . . . . *passim*

Gagnon v. Scarpelli,
411 U.S. 778 (1973) 15-16

Hollis v. Smith,
571 F.2d 685 (2d Cir. 1978) 13-14

In re Registrant C.A.,
679 A.2d 1153 (N.J. 1996). 6

Jenkins v. McKeithen,
395 U.S. 411 (1969) 14

Mathews v. Eldridge,
424 U.S. 319 (1976) 7,11

Memorial Hospital v. Maricopa County,
415 U.S. 250 (1974). 10

Morrissey v. Brewer,
408 U.S. 471 (1972) 16

Paul v. Davis,
424 U.S. 693 (1976) 15,17

Paul P. v. Verniero,
Civ. Action No. 97-2919(JEI), unpublished
opinion (D.N.J. June 26, 1997) 7

Russell v. Gregoire,
124 F.3d 1079 (9th Cir. 1979) 15

Santosky v. Kramer,
455 U.S. 745 (1982) 13

State v. Reyes,
504 A.2d 43 (N.J. App. Div.),
certif. denied 511 A.2d 671 (N.J. 1986) 6

United States v. W. T. Grant Co.,
345 U.S. 629 (1953) 17

W.P. v. Poritz,
931 F. Supp. 1187 (D.N.J. 1996) 1,7

W.P. v. Poritz,
931 F. Supp. 1199 (D.N.J. 1996). 1,5,7,12

W.P. v. Verniero,
127 F.3d 298 (3d Cir. 1997) 1

Statutes Cited:

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 6

N.J. Stat. Ann. §§ 2C:7-1 to 7-11 2,8

N.J. Stat. Ann. § 2C:7-1 3

United States Constitution Cited:

U.S. Const. Amend. XIV, § 1 2

New Jersey Constitution Cited:

N.J. Const. (1947), Art. I, ¶ 1 2

Rule Cited:

Supreme Court Rule 12.5 2

Other Authority Cited:

Order, *In re Amendment to Procedure for Hearings on Objections to Megan's Law Tier 2 and Tier 3 Classification and Manner of Notification Determination*, (N.J. September 10, 1997). 8

OPINIONS BELOW

The March 15, 1996 opinion and order of the United States District Court for the District of New Jersey, which certified a plaintiff class and entered a preliminary injunction staying community notification under Megan's Law as to the class members, is reported as *W.P. v. Poritz*, 931 F. Supp. 1187 (D.N.J. 1996), and is reprinted in petitioners' Appendix I [187a-208a]. The July 1, 1996 opinion and order of the United States District Court for the District of New Jersey, which granted summary judgment in favor of defendants (including cross-petitioner) and lifted the injunction, is reported as *W.P. v. Poritz*, 931 F. Supp. 1199 (D.N.J. 1996) and is reprinted in petitioners' Appendix H [133a-186a].

The July 9, 1996 order of the United States Court of Appeals for the Third Circuit, which stayed the order of the district court and continued the injunction during the pendency of the appeal, was not published and is reprinted in petitioners' Appendix G [131a-132a]. The August 20, 1997 opinion of the court of appeals, which affirmed in part and reversed in part, is reported as *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997), and is reprinted in petitioners' Appendix B [4a-120a]. The September 17, 1997 order of the court of appeals, which denied the petition for rehearing and rehearing *in banc*, is reported as *W.P. v. Verniero*, 127 F.3d 298 (3d Cir. 1997), and is reprinted in petitioners' Appendix C [121a-123a]. The October 3, 1997 amended judgment of the court of appeals, which corrected a clerical error, is not published and is reprinted in petitioners' Appendix A [1a-3a].

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit rendered its decision on August 20, 1997. The court of appeals denied petitioners' timely motion for rehearing on

September 17, 1997. On November 28, 1997, petitioners filed a petition for a writ of *certiorari*, Docket No. 97-887. This conditional cross-petition is timely filed pursuant to Rule 12.5. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1.

Article I, ¶ 1 of the New Jersey Constitution provides: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. Const. (1947), Art. I, ¶ 1.

STATUTORY PROVISIONS INVOLVED

New Jersey's Registration and Community Notification Laws, Pub. L. 1994, Chs. 128, 133 (codified at N.J. Stat. Ann. §§ 2C:7-1 to 7-11), popularly known as "Megan's Law," are reprinted in petitioners' Appendix J.

STATEMENT OF THE CASE

In the event the Court grants the petition for a writ of *certiorari* filed by petitioners (plaintiff-appellants below), Peter Verniero, the Attorney General of New Jersey, requests review of the portion of the court of appeals' decision which held that the Due Process Clause of the Fourteenth Amendment requires a different burden of persuasion and higher standard of proof in Megan's Law

hearings than was required under the procedures established in accordance with the decision of the Supreme Court of New Jersey. The court of appeals issued its decision in the context of a challenge to the constitutionality of the sex offender community notification requirements of New Jersey's Megan's Law, brought by a class of convicted sex offenders required to register under Megan's Law who committed predicate sex offenses before the October 31, 1994 effective date of the law and who have been or will be classified as a Tier 2 (moderate-risk of reoffense) or Tier 3 (high-risk) offender. *E.B. v. Verniero*, 119 F.3d 1077, 1087 (3d Cir. 1997), Appendix ("App.") B at 22a.[1]

The New Jersey Legislature enacted Megan's Law on October 31, 1994, to address the "danger of recidivism posed by sex offenders and others who have committed predatory acts against children, and the dangers posed by persons who prey on others as a result of mental illness." N.J. Stat. Ann. § 2C:7-1(a). Megan's Law established a system of registration of sex offenders and offenders who commit other predatory acts against children, N.J. Stat. Ann. § 2C:7-1(b), and a notification program in which the scope of notice is calibrated to the comparative risk of reoffense posed by the individual registered offender. *E.B.*, 119 F.3d at 1082-83, App. B at 10a. Under the three-tiered notification program, where the risk of reoffense is comparatively low (Tier 1 notification), dissemination of notice is limited to law enforcement authorities; where the risk is moderate (Tier 2 notification), institutions and organizations having the responsibility to care for and supervise children and women and which are likely to encounter the offender also receive notice; and where the risk is high (Tier 3 notification), those members of the

---

[1] All subsequent citations to the decisions of the court of appeals and the district court in this case will be to the published decisions and to the page numbers of petitioners' appendix to their petition.

public likely to encounter the offender are also notified. *E.B.*, 119 F.3d at 1083, App. B at 10a.

In *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995), the Supreme Court of New Jersey held that due process requires "judicial review of the Tier classification and the manner of notification prior to actual notification." *Id.* at 382. The court premised this conclusion upon a finding that community notification under Megan's Law implicates protectible liberty and privacy interests under the Due Process Clauses of the state and federal Constitutions, as well as in consideration of New Jersey's fundamental fairness doctrine. *Id.* at 417-20. Accordingly, the court established a comprehensive scheme for judicial review, with the following features:

> (1) except in exigent circumstances, offenders subject to notification receive written notice at least two weeks in advance, detailing the proposed Tier level and the specific manner proposed for notification;
>
> (2) the offender has the right to object to notification by filing a simple application with the court in his own county;
>
> (3) the offender is entitled to an automatic stay of notification if he files a timely objection;
>
> (4) the offender has the right to be represented by retained counsel, or, if he cannot afford it, to have free counsel appointed by the court;
>
> (5) the court is required to immediately set a date for a pre-notification court hearing;

(6) the offender is provided with extensive pre-hearing discovery of "all papers, documents, and other materials, including the prosecutor's findings and statement of reasons for the level and manner of the proposed notification;"

(7) the offender receives a hearing before a neutral fact-finder, a state trial court judge;

(8) the offender's privacy is protected because the hearing is held *in camera*;

(9) at the hearing, the State bears the initial burden of establishing a *prima facie* case justifying the proposed Tier level and manner of notification;

(10) if the prosecutor meets this burden, the offender then has the opportunity to rebut the State's *prima facie* case, by a preponderance of the evidence;

(11) the rules of evidence do not apply at the court hearing;

(12) notification cannot occur unless it is approved or meets the requirements set by the court; and

(13) if the court orders notification, the offender may seek to stay notification "to allow time for application to an appellate court."

Doe v. Poritz, *supra*, 662 A.2d at 382-85; *see also W.P. v. Poritz*, 931 F. Supp. at 1220, App. H, 176a-177a. The "*prima facie* case" must include a description of the class of

sex offenders required to register that constitute each tier level, including a description of each risk and some proof that the sex offender poses the risk of re-offense for that category (*i.e.*, substantially higher risk than those persons in the lower categories). *Doe v. Poritz*, *supra*, 662 A.2d at 384. The likelihood of reoffense is not the issue at these hearings, "but rather the relatively greater risk of reoffense compared either to the low-risk offender class or the moderate risk offender class." *Ibid.*

The Supreme Court of New Jersey further refined this procedure in *In re Registrant C.A.*, 679 A.2d 1153 (N.J. 1996), reiterating the basic tenets of the process to be afforded in state tier classification proceedings. In particular, the court reaffirmed that the appropriate hearing format is that utilized for probation violation hearings as set forth in *State v. Reyes*, 504 A.2d 43 (N.J. App. Div.), *certif. denied*, 511 A.2d 671 (N.J. 1986), where the State has the initial burden of presenting a *prima facie* case, which the challenger may rebut by a preponderance of the evidence. The court emphasized that only if the prosecutor satisfies his or her burden does the burden shift to a registrant challenging the proposed classification or notice. *C.A.*, *supra*, 679 A.2d at 1158.

On January 12, 1996, seven individuals previously convicted of sex offenses filed a complaint in the United States District Court for the District of New Jersey pursuant to 42 U.S.C. § 1983, alleging that the retroactive application of the community notification provisions of Megan's Law violates constitutional prohibitions against ex post facto laws and double jeopardy, and that the proceedings under Megan's Law violate the procedural due process protections of the Fourteenth Amendment. Subsequently, the district court certified a plaintiff class consisting of all sex offenders who committed predicate sex offenses before the October 31, 1994 effective date of Megan's Law who are or will be

subject to Tier 2 or Tier 3 notification. *W.P. v. Poritz*, 931 F. Supp. 1187 (D.N.J. 1996), App. I at 187a-208a.

The district court granted summary judgment in the State's favor, finding in pertinent part that the procedures established by the Supreme Court of New Jersey do not violate the Fourteenth Amendment's Due Process Clause. *W.P. v. Poritz*, 931 F. Supp. 1199 (D.N.J. 1996), App. H at 173a-186a.[2] The district court held the procedures to be within the "'flexible' boundaries of procedural due process recognized in *Mathews* [*v. Eldridge*, 424 U.S. 319 (1976),]" and found the evidentiary standard and placement of the burdens of proof as ordered by the state high court to be constitutionally sufficient. *W.P. v Poritz, supra*, 931 F.Supp. at 1222-23, App. H at 180a-184a.

Petitioners appealed from the district court's decision, and the court of appeals issued its decision on August 20, 1997. The court of appeals found that community notification under Megan's Law does not violate the Ex Post Facto or Double Jeopardy Clauses of the United States Constitution, but held that the procedures ordered by the Supreme Court of New Jersey for judicial review of tier classification and manner of notification are insufficient to protect petitioners' due process rights under the federal Constitution. Specifically, the court of appeals held that the Due Process Clause requires "a prior opportunity to challenge the registrant's [Tier 2 or Tier 3] classification and notification plan in a hearing at which the prosecutor has the

---

[2] In challenges to the prospective application of Megan's Law, two other district court judges in the District of New Jersey have held that the procedures mandated by the Supreme Court of New Jersey meet federal due process standards. *Alan A. v. Verniero*, 970 F. Supp. 1153, 1179-87 (D.N.J. 1997), *vacated on jurisdictional grounds*, Docket No. 97-5410, unpublished opinion (3d Cir. Dec. 10, 1997); *Paul P. v. Verniero*, Civ. Action No. 97-2919(JEI), unpublished opinion, Tr. at 171-78 (D.N.J. June 26, 1997).

burden of persuasion and must prove her case by clear and convincing evidence." *E.B.*, 119 F.3d at 1111, App. B at 81a. Accordingly, the court of appeals reversed the judgment of the district court and remanded the matter with instructions to enter an injunction foreclosing notification in Tier 2 or Tier 3 cases without compliance with these requirements of procedural due process and to deny any further relief. *Ibid.*

In issuing such instructions, the court of appeals essentially compelled the State to comply with the *E.B.* holding, forcing the State to either modify its procedures or forego the implementation of a public safety measure designed to provide some measure of protection against recidivist acts by convicted sex offenders. On August 27, 1997, cross-petitioner applied to the Supreme Court of New Jersey for amendment to the Megan's Law judicial review procedures, to ensure that law enforcement officials are not barred by federal injunction from fully implementing the notification plans authorized by final orders issued in the state court proceedings. On September 10, 1997, the Supreme Court of New Jersey ordered that:

> the procedure applicable to tier classification and notification determinations under the Registration and Community Notification Laws (RCNL), *N.J.S.A.* 2C:7-1 to -11, is hereby amended to require that in any such tier classification and notification determination, the State has the burden of persuasion to establish the registrant's tier classification and notification by clear and convincing evidence[.]

Order, *In re Amendment to Procedure for Hearings on Objections to Megan's Law Tier 2 and Tier 3 Classification and Manner of Notification Determination*, (N.J. September 10, 1997). The Order also provides that all registrants

whose classification and notification determinations were made in accordance with the prior procedure will be afforded appropriate notice of "the opportunity to seek redetermination of their tier classification and notification determinations in accordance with the procedures as hereby modified to conform to the decision in *E.B. v. Verniero*[.]" *Ibid.* By order dated December 9, 1997, the Supreme Court of New Jersey adopted a revised Outline of Procedure in compliance with the court's previous order of September 10, 1997.

On November 28, 1997, the Clerk of the Supreme Court docketed petitioners' petition for a writ of *certiorari*, seeking review of the court of appeals' ruling denying petitioners' ex post facto and double jeopardy claims. Cross-petitioner is submitting a separate response in opposition to that petition. In the event this Court were to grant petitioners' requested review, it is respectfully requested that this Court also review the court of appeals' holding that, in state court hearings to review the tier classification and manner of notification determinations under Megan's Law, federal due process requires the prosecutor to bear the burden of persuasion by clear and convincing evidence.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve the Conflict between the Court of Appeals and the Supreme Court of New Jersey regarding the Burden of Persuasion and Standard of Proof Required by Due Process in a Megan's Law Hearing.

Simply stated, there is a genuine and direct conflict between the decisions of the United States Court of Appeals for the Third Circuit and the Supreme Court of New Jersey concerning the question of the burden of persuasion and standard of proof required by the Due Process Clause of the federal Constitution in challenges to sex offender tier classification and manner of notification under Megan's Law. A disagreement between a federal court and a state's highest court on the same constitutional issue involving the same state law provides a sound basis for review by this Court. *See, e.g.*, *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974)(*certiorari* granted to resolve a conflict between the federal district court and the Arizona Supreme Court on whether a statute violated the Equal Protection Clause).

As applied to New Jersey's law, the *E.B.* decision results in an increased risk of error in the underestimation of an individual sex offender's relative risk of reoffense (and concomitant limitation of the scope of notification) due to application of the burden of persuasion and standard of proof mandated in accordance with the holding of the court of appeals than there is under the procedure ordered by the Supreme Court of New Jersey in *Doe v. Poritz*. This decisional conflict involves a divergence as to the relative magnitude of the State interest in providing community notification about moderate and high risk sex offenders versus the private interests of registrants in avoiding such notification. It also implicates considerations of comity with respect to the ability of a state court of last resort to establish judicial review procedures to protect liberty interests which

a federal court views solely as arising under the state Constitution. Accordingly, the due process issues raised in this case merit review by this Court.

Both the Supreme Court of New Jersey and the court of appeals analyzed the procedural due process issues by applying the factors identified in *Mathews v. Eldridge*, 424 U.S. 319 (1976). These factors include the importance of the private interest; the length or finality of the deprivation; the likelihood of government error; and the magnitude of the government interest involved. *Id.* at 334-35. The procedure established by the Supreme Court of New Jersey, in accordance with its holding on the requirements of due process, provided that:

> the State shall have the burden of going forward, that burden satisfied by the presentation of evidence that *prima facie* justifies the proposed level and manner of notification. Upon such proof, the offender shall have the burden of persuasion on both issues, the burden to remain with the offender.... [T]he court, assuming the State has satisfied its burden of going forward, shall affirm the prosecutor's determination unless it is persuaded by a preponderance of the evidence that it does not conform to the laws and [the Attorney General's] Guidelines. [*Doe*, *supra*, 662 A.2d. at 383.]

The shifting burden of persuasion established by the *Doe v. Poritz* decision reflects the state court's balancing of the registrants' reputational and privacy interests in the nondisclosure to the public of information provided under Megan's Law against the State's compelling interest in sharing accurate, largely public, record information that can protect communities (especially children) from a particularly devastating type of violent crime. The district court found

no fault with the procedural burden ordered by the state court: "the offender who initiates a proceeding before the Superior Court for review of his Tier classification is not unlike a plaintiff in a civil action, one who traditionally bears the burden of proof by a preponderance of the evidence." *W.P. v. Poritz*, *supra*, 931 F. Supp. at 1223, App. H at 183a. The district court also noted that, "under Megan's Law, the prosecutor must establish a *prima facie* case before the offender is required to go forward," observing that "this requirement placed upon the prosecutor affords to the offender a procedural benefit not enjoyed by a traditional civil plaintiff." *Ibid.*

The court of appeals disagreed, finding that the Due Process Clause "would be violated by any Tier 2 or Tier 3 notification that occurred without a prior opportunity to challenge the registrant's classification and notification plan in a hearing at which the prosecutor has the burden of persuasion and must prove her case by clear and convincing evidence." *E.B.*, *supra*, 119 F.3d at 1111, App. B at 81a. In reaching its contrary conclusion, the court of appeals noted that the risk of error in a Megan's Law hearing is "substantially greater than that in a typical civil damage suit" and held that this risk justifies the assignment of the burden of persuasion to the prosecutor. *Id.* at 1109, App. B. at 75a. However, just as the State has no interest in notifying the public about a registrant who has erroneously been identified as a moderate or high risk, it has a compelling interest in not erroneously identifying a registrant as a low risk and thereby withholding notification information from potential victims and relevant caregivers likely to encounter the registrant. The court of appeals regarded this risk differently than did the state court and district court, and reached a contrary conclusion.

The minimum standard of proof required by the Due Process Clause "reflects not only the weight of the private and public interests affected, but also a societal judgment

about how the risk of error should be distributed between the litigants." *Santosky v. Kramer*, 455 U.S. 745, 755 (1982). The state court found it appropriate for the registrant to share equally in the risk of error, having concluded that the privacy interests involved in notification are "diminished" because the information is mainly a matter of public record. *Doe*, *supra*, 662 A.2d at 411. The state court expressly held that the information is "not deserving of a particularly high degree of protection." *Ibid.* This led the court to adopt the preponderance of error standard, which allocates the risk of error equally among the litigants rather than having one litigant bear the brunt of the risk. *Santosky v. Kramer*, 455 U.S. at 755.

The court of appeals, although it deferred to the state court's finding of a protected interest in the *Doe* decision, nonetheless accorded to the interest a significantly greater weight than did the state court in *Doe*. In so doing, the court of appeals transformed those interests into a right different than that recognized by the state court. The court of appeals opined that "[a]n erroneous underestimation of an individual's dangerousness will not necessarily result in harm to protected groups" and contrasted that with the observation that "an overestimation of an individual's dangerousness will lead to immediate and irreparable harm to the offender: his conviction becomes public, he is officially recorded as being a danger to the community, and the veil of relative anonymity behind which he might have existed disappears." *E.B.*, *supra*, 119 F.3d at 1110, App. B. at 77a-79a. The court of appeals therefore issued its decision contrary to the state court's decision, determining "clear and convincing evidence" to be the appropriate standard of proof.

However, the "clear and convincing" standard is reserved for matters involving a significant infringement on constitutionally protected interests. *See Addington v. Texas*, 441 U.S. 418 (1979) (civil commitment); *Santosky*, *supra*, 455 U.S. 745 (termination of parental rights); *Hollis v.*

Smith, 571 F.2d 685 (2d Cir. 1978) (indeterminate sentencing); *Jenkins v. McKeithen*, 395 U.S. 411 (1969)(criminal investigations). The application of this standard to Megan's Law judicial review proceedings is inconsistent with the civil, remedial character of the law.

In light of the clear conflict between the decisions of these two courts on these significant procedural issues, it is respectfully requested that, should the Court grant *certiorari* to review petitioners' claims, it also consider the merits of these due process issues upon which the Supreme Court of New Jersey and the United States Court of Appeals for the Third Circuit disagree.

II. This Court should consider the important question of whether a liberty interest for which the Due Process Clause of the state Constitution requires procedural protection automatically triggers application of the procedural requirements of the Fourteenth Amendment.

In the course of its procedural due process analysis, the court of appeals observed, "the scope of the phrase 'liberty interest' as used in the context of the Due Process Clause has not been fully delineated." *E.B.*, *supra*, 119 F.3d at 1106 n.27; App. B at 67a. The accuracy of this proposition is embodied by the court's expansive construction of liberty interests under the Fourteenth Amendment to automatically include any liberty interest a state court recognizes as protected under the Due Process Clause of a state constitution. Under the reasoning applied in *E.B.*, all state-protected liberty interests would trigger the procedural protections of the Fourteenth Amendment, irrespective of whether the same interest is protected under the federal Constitution. This construction could render meaningless any lesser protections deemed to meet state constitutional requirements. This result is particularly inappropriate where the state court decision, which the federal court second-

guesses, provides the springboard to the federal court's due process analysis.

In *Doe v. Poritz*, the Supreme Court of New Jersey found that the disclosure authorized by notification implicates liberty interests protected under both the State and federal Constitutions. *Id.*, 662 A.2d at 419. As a matter of state law, respondent is bound by the *Doe* court's conclusions, as well as by the procedural requirements dictated by the court's holding. However, the *E.B.* court, relying on *Paul v. Davis*, rejected the notion that the publication of information of registrants' convictions and findings of dangerousness implicates any interest of fundamental constitutional magnitude. *E.B.*, *supra*, 119 F.3d at 1104, App. B at 61a.[3] Although the court of appeals did not embrace the *Doe* court's holding that community notification implicates a protected liberty interest under the United States Constitution, it predicated its divergent due process analysis solely on the state court's finding of liberty and privacy interests protected under the New Jersey Constitution. It was on this state law basis that the federal court was able to contradict the holding of New Jersey's highest court, ruling that federal due process mandates additional procedural protections beyond those ordered by the state court. *E.B.*, 119 F.3d at 1105, App. B. at 65a-66a.

The court of appeals, in holding that the procedural protections of the Fourteenth Amendment are automatically triggered by the state court's recognition of a liberty interest under the state Constitution, relied on two cases, *Gagnon v.*

---

[3] The Ninth Circuit reached a similar conclusion in its application of *Paul v. Davis*, rejecting the notion that notification under the Washington state law implicates a constitutional right to privacy and a protected liberty interest under the Due Process Clause. *Russell v. Gregoire*, 124 F.3d 1079, 1093-94 (9th Cir. 1979).

Scarpelli, 411 U.S. 778 (1973), and *Morrissey v. Brewer*, 408 U.S. 471 (1972), which apply Fourteenth Amendment due process protections to statutorily-created rights. However, this Court has never extended this precedent, traditionally applied in the context of such parole and probation cases, to encompass liberty interests recognized under state constitutional procedural principles.

In making this leap, the court of appeals expanded the scope of "liberty interest" as used in the context of the federal Due Process Clause beyond the boundaries previously recognized by this Court. The court of appeals did not find the interest in avoiding public disclosure of information under Megan's Law to be protected under the Due Process Clause of the federal Constitution, nor did it identify a state statute which creates an interest in avoiding notification. The court of appeals' extension to protected state liberty interests of the case law principle previously applied to statutorily-created rights lacks precedential support.

Similarly, the "property interests" in the cases which the court below cites as a corollary regarding its perception of the expansive approach this Court has taken with respect to application of the Fourteenth Amendment to "virtually all rights that states will enforce in a court of law[,]" *E.B.*, 119 F.3d at 1106 n.27, App. B. at 67a-68a, involve interests of a different nature than those at issue here. As this Court has held, "[p]roperty interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law....'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985), *quoting Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Thus, without any support in a decision of this Court, the *E.B.* court held that a liberty interest which a federal court acknowledges as arising only in the context of state constitutional due process analysis is tantamount to a right

created by state law for purposes of application of the Fourteenth Amendment.

Under the reasoning applied in *E.B.*, an interest which is not protected under federal due process jurisprudence would nonetheless trigger such protection because it receives procedural protections mandated by the state Constitution. This construction of liberty interests under the Fourteenth Amendment provides for an overlay of federal judicial review which will subject state courts analyzing state-recognized liberty interests to routine second-guessing by federal courts on the extent of procedural protections required. This result is analogous to that rejected by the Court in *Paul v. Davis*, which would have made the Fourteenth Amendment "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.*, 424 U.S. at 701. Disapproval of this construction of liberty interests under the Fourteenth Amendment would reinforce the vitality of procedures established pursuant to state constitutional requirements as well as ensure the autonomy of state court review of state constitutional issues.

Finally, it is appropriate to address the issue of whether, in light of the September 10, 1997 order by the Supreme Court amending the Megan's Law hearing procedures to incorporate the burden of persuasion and standard of evidence required by *E.B.*, the issue has become moot. The burden of demonstrating mootness is a heavy one and, as a general rule, "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953), *cited in County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).

The injunction directed by the order in *E.B.* prevented the execution of existing final orders authorizing

Tier 2 and Tier 3 notification which complied with all due process requirements as established by the state court, and effectively foreclosed the implementation of any future notification orders (119 F.3d at 1111, App. B at 81a). In response to the Attorney General's application to amend the Megan's Law judicial review procedures, the Supreme Court of New Jersey modified the procedures to enable the State to implement community notification in accordance with the injunction directed by *E.B.*[4] The order did not vacate or reverse the *Doe v. Poritz* decision, but merely affected a change in the existing procedure to enable the implementation of the law in light of the injunction. It would make little sense to instigate further delay in the implementation of an important public safety measure by seeking to restore the prior procedure, thereby precipitating additional federal litigation and a renewed injunction against notification, in order for the Court to resolve this decisional conflict. These exceptional circumstances justify a conclusion that this matter is not moot.

Accordingly, in order to resolve the direct conflict between the state and federal courts concerning the burden of persuasion and standard of proof required by the Due Process Clause of the federal Constitution in judicial proceedings under Megan's Law, and to more fully delineate the proper scope of "liberty interests" in the context of the Fourteenth Amendment, the Court should grant this cross-petition in the event it decides to review the court of appeals' decision in *E.B.*

---

[4] The court of appeals issued a subsequent order, following Justice Souter's order denying petitioners' application to extend the stay of community notification pending consideration of their petition for writ of *certiorari*, which vacated all orders previously entered staying the implementation of community notification. It should be noted that the court of appeals had been provided with the September 10, 1997 order of the Supreme Court of New Jersey.

CONCLUSION

For the reasons stated above, the Attorney General of New Jersey respectfully requests that, in the event the Court grants the petition for a writ of *certiorari* filed by petitioners, the Court grant this conditional cross-petition for a writ of *certiorari* and set this case for plenary review.

Respectfully submitted,

PETER VERNIERO
Attorney General of New Jersey
(Counsel of Record)

JOSEPH L. YANNOTTI
Assistant Attorney General

RHONDA S. BERLINER-GOLD
B. STEPHAN FINKEL
Deputy Attorneys General

R.J. Hughes Justice Complex
25 Market Street, P.O. Box 080
Trenton, New Jersey 08625
(609) 292-4925

Attorney for Cross-Petitioner

Dated: December 28, 1997

Supreme Court, U.S.
FILED
JAN 28 1998
CLERK

No. 97-1074

In The

Supreme Court of the United States

October Term, 1997

PETER VERNIERO, Attorney General of New Jersey, *et al.*,

Petitioners,

vs.

W.P., *et al.*, Individually and as Representatives of a Class Pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2),

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF PETITIONERS IN OPPOSITION TO RESPONDENTS' CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

MICHAEL Z. BUNCHER
EDWARD L. BAROCAS
New Jersey Office of the
Public Defender
Special Hearings Unit
R.J. Hughes Justice Complex
P.O. Box 850
Trenton, New Jersey 08625
(609) 292-7677

JOHN J. GIBBONS
Counsel of Record
LAWRENCE S. LUSTBERG
KERRIE R. HESLIN
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE, P.C.
One Riverfront Plaza
Newark, New Jersey 07102-5497
(973) 596-4500

Attorneys for Petitioners

144437

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, Inc.

QUESTIONS PRESENTED

1. Whether the court of appeals' decision, that the Due Process Clause of the United States Constitution requires the State to bear the burden of proof at a hearing under Megan's Law and establish by clear and convincing evidence the relative degree of risk of reoffense which determines the classification of the sex offender, conflicts with the New Jersey Supreme Court's decision in *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995).

2. Whether a liberty interest recognized by the Supreme Court of New Jersey as arising under the New Jersey Constitution is protected by the federal Due Process Clause as are other state-created liberty interests.

STATEMENT

Petitioners here oppose the Conditional Cross-Petition for a Writ of Certiorari (hereinafter "Cross-Petition") seeking limited review of the decision of the United States Court of Appeals for the Third Circuit in *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997), Appendix B ("App. B") to the Petition for a Writ of Certiorari. In *E.B.*, the court of appeals concluded that the Due Process Clause of the Fourteenth Amendment of the Constitution requires that, under Megan's Law, the State bear the burden of proving by clear and convincing evidence the relative degree of risk of reoffense, based upon which the extent of notification is determined. App. B at 80a. Respondents now Cross-Petition, contending that the court of appeals' decision stands in conflict with the decision of the Supreme Court of New Jersey in *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995), and that, in any event, federal due process guarantees are not triggered by state law deriving from a state constitution.

The Cross-Petition must be denied. First, the New Jersey Supreme Court has recently amended its decision in *Doe v. Poritz* to eviscerate any conflict with the court of appeals' decision. Second, the issue of whether the state constitution can give rise to liberty interests which trigger federal due process protection was not raised or argued below, and cannot be properly reviewed by this Court. Nor, finally, can respondents provide any case law to support their legal argument that a state constitution cannot give rise to a liberty interest for purposes of federal due process analysis, or indicate a conflict among the lower courts with respect to this issue.

REASONS FOR DENYING THE WRIT

I. The Decision Of The Court Of Appeals Is Not In Conflict With The New Jersey Supreme Court's Holding In *Doe v. Poritz*.

Respondents first argument in support of their Cross-Petition for review of the court of appeals' decision is that there is a conflict between the decision of the court of appeals in *E.B.* and the New Jersey Supreme

Court's holding in *Doe v. Poritz*. This argument is without basis, and must be rejected.

Specifically, after the court of appeals concluded that the federal Due Process Clause requires the State to carry the burden of proof at a Megan's Law hearing by clear and convincing evidence, App. B at 80a, the New Jersey Supreme Court effectively amended its decision in *Doe v. Poritz* to provide for this federal guarantee. In an Order, dated December 9, 1997, attached hereto as Appendix 1 ("App. 1"), the New Jersey Supreme Court officially amended the procedure for hearings on Tier 2 and Tier 3 classifications under Megan's Law. The procedures created by the New Jersey Supreme Court, and now being applied in practice, provide that "[a]t the hearing, the prosecutor has the burden of persuasion by clear and convincing evidence as to both tier classification and the manner of notification." App. 1 at 7a. Moreover, the state court not only prospectively altered the State's burden of proof, but provided a procedure whereby previously classified individuals could request a redetermination utilizing this burden and standard of proof. App. 1 at 9a, 14a. These amendments render the procedures attendant to Megan's Law, and the court's decision in *Doe v. Poritz*, entirely consistent with the court of appeals' holding that the federal Due Process Clause requires the State to bear the burden of proof by clear and convincing evidence.

The New Jersey Supreme Court's Order, amending its prior decisional law, does not assert that the resulting procedural changes are temporary or contingent on the outcome of this case. In sum, then, there now exists no conflict between the decisions of the Supreme Court of New Jersey and the United States Court of Appeals for the Third Circuit. Accordingly, respondents' Cross-Petition must be denied.

II. Respondents' Cross-Petition Must Be Denied Because The Issues Raised Therein Were Not Presented To The Lower Courts And Are Not Supported By Any Case Law Or The Subject Of Conflicting Lower Court Decisions.

A. The Question of Whether Liberty Interests Arising Under A State Constitution Are Protected By The Due Process Clause Of The United States Constitution Was Not Raised Or Argued Below.

In their Cross-Petition, respondents argue, for the first time, that a liberty interest created by a state constitution is not afforded protection under the federal Due Process Clause. In both the district court and the court of appeals, petitioners asserted that the procedures set forth under Megan's Law did not provide the minimum protections required under the federal Due Process Clause. The only argument respondents asserted in opposition to petitioners' due process challenge concerned the proper burden of proof to be carried by the State at a Megan's Law hearing. Because their current contention, that the Due Process Clause of the Fourteenth Amendment to the United States Constitution does not protect liberty interests arising under a state constitution, has not been briefed, argued or decided below, it is not appropriately raised at this time. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 532-33 (1992) (declining to review petitioners' substantive due process challenge to ordinance because it was not raised or addressed below); *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) (refusing to review petitioners' due process challenge to state statute because argument was not briefed or raised in lower courts). Respondents' Cross-Petition should accordingly be denied.

B. There Is No Precendential Support Or Conflict In The Lower Courts Which Supports Respondents' Argument That Only Statutorily-Created Rights Are Afforded Protection By The Federal Due Process Clause.

The Cross-Petition should also be denied because respondents' argument, that the federal Due Process Clause extends only to

statutorily-created liberty interests but not to liberty interests created by a state's constitution, is without support in the law. Nor is it the subject of conflicting lower court opinions.

It is well-settled that liberty interests "may arise from two sources — the Due Process Clause itself and the laws of the States." *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (quoting *Hewitt v. Helms*, 459 U.S. 460, 466 (1983)); *see also Sandin v. Conner*, 515 U.S. 472, 483 (1995). The "laws of the States," in turn, include not only statutes, as respondents contend, *see* Cross-Petition at 16, but also regulations, administrative practices, contractual arrangements, or other mutual understandings, *see, e.g., Sandin*, 515 U.S. at 474, and even the common law, *see Mills v. Rogers*, 457 U.S. 291, 303 (1982).

Respondents here assert, however, that relevant state law does not include a state constitution or judicial interpretations thereof. Neither this Court, nor any lower court, has drawn this distinction. Instead, state constitutions have been consistently viewed as a source of liberty interests for purposes of both substantive and procedural due process analyses, *see Cruzan v. Director of Mo. Dep't of Health*, 497 U.S. 261, 277 (1990); *Montero v. Meyers*, 13 F.3d 1444, 1448 (10th Cir.), *cert. denied*, 513 U.S. 888 (1994), as well as for other constitutional inquiry. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 79 (1980) (holding that state constitutional provisions are equivalent to state statutes for purpose of determining whether law is repugnant to laws of the state under 28 U.S.C. § 1257).

The New Jersey Supreme Court, in *Doe v. Poritz*, 662 A.2d at 412, expressly found that the State Constitution provided petitioners with a right to privacy that gives rise to a liberty interest. The court of appeals, properly deferring to the state court's interpretation of its own law, *see Schad v. Arizona*, 501 U.S. 624, 636 (1991), appropriately held that petitioners could not, therefore, be deprived of that right to privacy without cause, *i.e.*, "a showing of an overriding state interest." App. B at 66a. Utilizing well-established methodology for determining what process is then due, the court of appeals correctly concluded that the State must bear the burden of persuasion, by clear and convincing evidence, in order to establish this interest. App. B at 98a-80a.

Respondents' belated challenge to this unassailable holding should be rejected and their Cross-Petition should be denied.

CONCLUSION

For the reasons stated above, petitioners respectfully request that the Conditional Cross-Petition for a Writ of Certiorari be denied.

Respectfully submitted,

JOHN J. GIBBONS
Counsel of Record
LAWRENCE S. LUSTBERG
KERRIE R. HESLIN
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE, P.C.
One Riverfront Plaza
Newark, New Jersey 07102-5497
(973) 596-4500

MICHAEL Z. BUNCHER
EDWARD L. BAROCAS
New Jersey Office of the
Public Defender
Special Hearings Unit
R.J. Hughes Justice Complex
P.O. Box 850
Trenton, New Jersey 08625
(609) 292-7677

Attorneys for Petitioners

APPENDIX

APPENDIX 1 — ORDER OF THE SUPREME COURT OF NEW JERSEY DATED DECEMBER 9, 1997

SUPREME COURT OF NEW JERSEY

IN THE MATTER OF AMENDMENT TO PROCEDURE FOR HEARINGS ON OBJECTIONS TO MEGAN'S LAW TIER 2 AND TIER 3 CLASSIFICATION AND MANNER OF NOTIFICATION DETERMINATION

ORDER

The Court, on the application of the Attorney General, having issued an Order on September 10, 1997, amending procedures applicable to tier classification and notification determinations under the Registration and Community Notification Laws, *N.J.S.A.* 2C:7-1 to -11, (Megan's Law),

And the Court having directed that the October 23, 1995, "Outline of Procedure for Hearings on Objections to Megan's Law Tier 2 and 3 Classification and Manner of Notification Determinations" (Outline of Procedure), together with notice and application forms, be revised to comply with the Court's Order of September 10, 1997,

And the Court having duly considered the revised Outline of Procedure and having determined that it complies with the Court's Order of September 10, 1997,

And good cause appearing;

IT IS ORDERED that as revised, the appended Outline of Procedure is adopted, to be effective immediately.

For the Court,
s/ illegible
Acting C.J.

Dated: December 9, 1997

Appendix 1

Outline of Procedure for Hearings on Objections to Tier 2 or Tier 3 Classification and Manner of Notification Determinations under the Registration and Community Notification Laws (Megan's Law)

Adopted as Revised
December 9, 1997
Supreme Court of New Jersey

Appendix 1

* * *

CASES NOT YET DISPOSED OF OUTLINE OF PROCEDURE FOR HEARINGS ON OBJECTIONS TO TIER 2 OR TIER 3 CLASSIFICATION AND MANNER OF NOTIFICATION DETERMINATIONS

I. The court shall render its tier classification and manner of notification determination within 45 days of the date of the notice to the registrant, except as provided in VI.C.7. below.

II. Personal service of the Notice shall be made by a designee or employee of the prosecutor not having a direct interest in the tier classification or manner of notification.

III. Because the Supreme Court decision allows registrant 14 days to object to tier 2 or tier 3 classification and manner of notification (see IV below), all steps necessary to comply with that 14 day time frame shall be expedited.

A. Registrant shall be informed that he or she has five days from receipt of the Notice to request assigned counsel on the basis of indigence. (Registrant has 14 days to decide to object.)

1. The decision as to indigence and appointment of counsel shall be made within two days of registrant's request.

B. The prosecutor, prior to preparation of the Notice, shall consult with the judge designated in that vicinage to hear Megan's Law cases to set the date for a conference,

which shall be held between twenty-one and twenty-four days from the date of anticipated service of the Notice. The conference date shall be included in the Notice.

C. Attorney for registrant may request discovery at any time after the registrant's receipt of Notice of tier 2 or tier 3 classification.

1. Discovery is to be made available within two working days either of registrant's request or of notice to the prosecutor that registrant has retained or been assigned counsel.

a. "Made available" means available for pick up, unless specific arrangements for mailing are made by counsel for the registrant.

b. Discovery is defined as "all papers, documents, and other materials compiled for the purpose of the prosecutor's review."

c. Notwithstanding, any rule, regulation, or policy of confidentiality, the registrant shall have the right to inspect and copy all papers, documents, and other materials compiled for purposes of the prosecutor's review or which were relied on by the prosecutor in determining the registrant's tier classification or the manner of notification, and any other records relating to the registrant's mental or physical condition that may be maintained by other agencies or entities.

d. The prosecutor, or the custodian of any such records, may request an in camera judicial

inspection of such records to determine whether there exits a continued need for confidentiality or whether disclosure should be withheld to require sanitization based on the need for confidentiality.

IV. Objections either to tier 2 or tier 3 classification or to the manner of notification are required to be filed as follows within 14 calendar days of receipt of the Notice from the prosecutor:

A. Filed with the Designated Judge for hearing Megan's Law objections, including therewith a copy of the prosecutor's findings and statement of reasons.

B. Filed with the prosecutor on the same date as the filing with the Designated Judge.

V. On the registrant's filing of any such objection, discovery shall be made available within two working days of prosecutor's receipt of that objection, if it has not previously been provided.

A. A copy of any such discovery shall also be provided to the Court.

VI. Conference

A. Registrant should be allowed to attend the conference (even if the registrant is incarcerated).

B. At the conference, registrant and the prosecutor shall be prepared to discuss the following:

Appendix 1

1. Settlement possibilities

2. Discovery issues, if any

   a. The parties should be encouraged to attempt to resolve discovery disputes before the conference.

3. Issues in the case

   a. Counsel for the registrant must identify those factors to which exception will be taken; this may be done in advance of the conference.

4. The need for the prosecutor to retain an expert to examine the registrant

5. Identities of any experts

6. Availability of those experts for a hearing

7. Identification of documents

8. Scheduling of a hearing, if necessary.

C. At the conference, the judge should:

   1. Encourage settlement discussions

   2. Render a final decision if the judge determines that a final disposition can be made without a further hearing.

   3. Resolve discovery issues

4. Determine the need for experts

5. Determine the necessity for and nature of any hearing, including

   a. What issues need to be resolved

   b. What issues can be decided on non-testimonial submissions

   c. What issues require testimony and by whom, with specific focus on whether expert testimony will be necessary

   d. Set the schedule for any non-testimonial submissions, with such submissions to be filed in advance of the hearing date

6. Registrant must be allowed to address the court.

7. Set date for hearing, which should be between 10 and 14 days from date of conference, except that (a) the time frame may be shorter if all parties agree, or (b) it may be longer for good cause shown, but no longer than 45 days from the date of conference.

VII. Conduct of hearing

A. The hearing shall be *in camera*

B. Evidential burden

1. At the hearing, the prosecutor has the burden of persuasion by clear and convincing evidence as to both tier classification and the manner of notification.

2. The judge's determination that the burden of persuasion has been met and justifies the classification and the manner of proposed notification shall be supported by findings of fact and statement of reasons. See VIII, below.

C. Although the rules of evidence do not apply in the hearing, the judge shall consider evidence that is "relevant and trustworthy." *See R.* 3:21-4, Comment 1. The judge may also consider information from the application for review form, as completed by the registrant, including any objection filed pursuant to IV, above, but neither the registrant's statement of objections and statement of reasons nor the absence of same shall be used against the registrant as admissions or otherwise.

D. The judge shall make a final determination at the conclusion of the hearing.

VIII. In all cases, the judge's final determination, including those based on registrant's default, shall contain express findings of fact based on the standard of clear and convincing evidence that support the judge's conclusion that the State either has or has not met its burden of persuasion both as to tier classification and manner of notification; such findings shall also be specifically included or expressly incorporated by reference in the final order.

IX. Subject to any applicable stay or injunctive order, all orders authorizing notification shall contain a provision that they do not become effective until the expiration of two full business days from the date of the final order.

Appendix 1

CASES PREVIOUSLY DISPOSED OF OUTLINE OF PROCEDURE FOR REDETERMINATION OF TIER 2 AND TIER 3 CLASSIFICATION AND MANNER OF NOTIFICATION DETERMINATIONS

I. The court shall render its tier classification and manner of notification determination within 45 days of the date of the notice of the registrant, except as provided in VII.C.7. below.

II. Personal service of the Notice shall be made by a designee or employee of the prosecutor not having a direct interest in the tier classification or manner of notification.

III. The procedure for redetermination for registrants whose cases were originally determined by default, or whose cases were not the subject of a final order, shall be governed by I-XI of this Outline of Procedure. The redetermination procedure for registrants whose cases were determined after a conference or hearing shall be governed by I-III and IX-XVIII of this Outline of Procedure.

IV. Because the Supreme Court decision allows registrant 14 days to object to tier 2 or tier 3 classification and manner of notification (see V below), all steps necessary to comply with that 14 day time frame shall be expedited.

A. Registrant shall be advised that he or she has five days from receipt of Notice to request assigned counsel on the basis of indigence. (Registrant has 14 days to decide to object.)

1. The decision as to indigence and appointment of counsel shall be made within two days of registrant's request.

Appendix 1

B. The prosecutor, prior to preparation of the Notice, shall consult with the judge designated in that vicinage to hear Megan's Law cases to set the date for a conference, which shall be held between twenty-one and twenty-four days from the date of anticipated service of the Notice; the conference date shall be included in the Notice.

C. Attorney for registrant may request discovery any time after registrant's receipt of notice of tier 2 or tier 3 classification.

1. Discovery is to be made available within two working days either of registrant's request or of notice to the prosecutor that registrant has retained or been assigned counsel.

a. "Made available" means available for pick up, unless arrangements for mailing are made by counsel for registrant.

b. Discovery is defined as "all papers, documents and other materials compiled for the purpose of the prosecutor's reviews."

c. Notwithstanding, any rule, regulation or policy of confidentiality, the registrant shall have the right to inspect and copy all papers, documents and other materials compiled for the purpose of the prosecutor's review or which were relied on by the prosecutor in determining the registrant's tier classification or the manner of notification, and any other records relating to the registrant's mental of physical condition that may be maintained by other agencies or entities.

Appendix 1

d. The prosecutor, or the custodian of any such records, may request an in camera judicial inspection of such records to determine whether there exists a continued need for confidentiality or whether disclosure should be withheld to require sanitization based on confidentiality.

V. Objection either to tier 2 or tier 3 classification or the manner of notification are required to be filed as follows within 14 calendar days of receipt of the Notice from the prosecutor:

A. Filed with the Designated Judge for hearing Megan's Law objections, including therewith a copy of the prosecutor's findings and statement of reasons.

B. Filed with the prosecutor on same date as the filing with the Designated Judge.

VI. On the registrant's filing of any such objection, discovery shall be made available within two working days of prosecutor's receipt of that objection, if it has not previously been provided.

A. A copy of any such discovery shall also be provided to the Court.

VII. Conference

A. Registrant should be allowed to attend the conference (even if the registrant is incarcerated.)

B. At the conference, registrant and the prosecutor shall be prepared to discuss the following:

Appendix 1

1. Settlement possibilities

2. Discovery issues, if any

    a. The parties should be encouraged to attempt to resolve discovery disputes before the conference.

3. Issues in the case

    a. Counsel for the registrant must identify those factors to which exception will be taken; his may be done in advance of the conference.

4. The need for the prosecutor to retain an expert to examine the registrant

5. Identities of any experts

6. Availability of those experts for a hearing

7. Identification of documents

8. Scheduling of hearing, if necessary.

C. At the conference, the judge should:

1. Encourage settlement discussions

2. Render a final decision if the judge determines that a final disposition can be made without a further hearing

3. Resolve discovery issues

4. Determine the need for experts

5. Determine the necessity for and nature of any hearing, including

   a. What issues need to be resolved

   b. What issues can be decided on non-testimonial submissions

   c. What issues require testimony and by whom, with specific focus on whether expert testimony will be necessary

   d. Set the schedule for any non-testimonial submissions, with such submissions to be filed in advance of the hearing date

6. Registrant must be allowed to address the court.

7. Set date for hearing, which should be between 10 and 14 days from date of conference, except that (a) the time frame may be shorter if all parties agreed, or (b) it may be longer for good cause shown, but no longer than 45 days from the date of conference.

VIII. Conduct of hearing

A. The hearing shall be *in camera*

Appendix 1

B. Evidential burden

1. At the hearing, the prosecutor has the burden of persuasion by clear and convincing evidence as to both tier classification and manner of notification.

2. The judge's determination that the burden of persuasion has been met and justifies the proposed classification and the manner of notification shall be supported by findings of facts and statement of reasons. See X, below.

C. Although the rules of evidence do not apply in the hearing, the judge shall consider evidence that is "relevant and trustworthy." *See R.* 3:21-4, Comment 1. The judge may also consider information from the application for review form, as completed by the registrant, including an objection filed pursuant to IV, above, but neither the registrant's statement of objections and statement of reasons nor the absence of same shall be used against the registrant as admission or otherwise.

D. The judge shall make a final determination at the conclusion of the hearing.

IX. Where a registrant has moved to a new county after the original conference\hearing was held, the Redetermination Notice will be sent by the prosecutor of the new county of residence. All further proceedings shall be conducted by the designated judge in the current county of residence.

X. In redetermination cases where the registrant originally defaulted, or where a final order has not been entered or

where the registrant has defaulted after notice of opportunity for a redetermination, the judge's final redetermination shall contain express findings of fact based on the standard of clear and convincing evidence that support the judge's conclusions that the State either has or has not met its burden of persuasion both as to tier classification and manner of notification; such findings shall also be specifically included or expressly incorporated by reference in the final order. In redetermination cases, where the registrant defaults after notice of opportunity or redetermination or does not seek a redetermination, the transcript of any previous conference or hearing in the original determination proceeding need not be ordered unless the judge determines it is necessary for a fair and complete redetermination.

XI. Subject to any applicable stay or injunctive order, all orders authorizing notification shall contain a provision that they do not become effective until the expiration of two full business days subsequent to the date of the execution of the order.

XII. The "Notice of Opportunity for Redetermination of Classification and Manner of Notification" sent by the prosecutor to the registrant shall contain a copy of the court's order, together with a copy of the Registrant Risk Assessment Scale, as amended at the conference or hearing.

XIII. The registrant shall be given 14 days to decide whether to seek a redetermination of classification and manner of notification. If the registrant decides to seek redetermination, he or she may provide any supplemental

material to be considered by the court within 28 days of the date of the "Notice of Opportunity for Redetermination of Classification and Manner of Notification". If the judge decides that the redetermination may be based on a *de novo* hearing on the existing record, the date of that hearing shall occur no later than 42 days from the date of the "Notice of Opportunity for Redetermination of Classification and Manner of Notification".

XIV. If, in the original proceedings, registrant was represented by pro bono counsel, said counsel shall continue to represent registrant in all redetermination proceedings, except if the court decides that a final plenary hearing is necessary in order to redetermine registrant's tier classification and manner of notification. Former *pro bono* counsel shall continue to represent registrant (1) to determine whether to seek a redetermination and to present to the court with any supplemental material the registrant is asking that the judge consider and (2) and in those cases in which the judge decides that redetermination can be based on a *de novo* hearing on the existing record or as that record may be supplemented by relatively minor submissions. The court, on motion of former pro bono counsel, shall relieve counsel of any further obligation to represent registrant and shall appoint an attorney from the public defender's special hearings unit to represent the registrant, if the court decides that the redetermination of tier classification and manner of notification requires extensive supplementation of the existing record or should be based on a full plenary hearing.

XV. The judge who conducted the original conference\hearing shall conduct all proceedings for redetermination unless that judge is unavailable in which event the

redetermination proceedings shall be undertaken by the designated judge.

XVI. The judge may, after a *de novo* hearing on the record, render a final redetermination. Any redetermination based on a *de novo* hearing on the existing record shall include material contained in the original case file and transcripts of proceedings in the case or agreed statements of facts in lieu thereof, together with any supplemental non-testimonial material provided by the prosecutor or registrant that the judge determines to be probative.

If the judge determines that a final redetermination cannot be rendered on the existing record even as supplemented, and that additional testimonial evidence is required to supplement the record, the judge shall schedule the case for a plenary hearing to admit such additional testimonial evidence, which shall be considered together with the existing record, as supplemented, as a basis for final redetermination.

If the judge determines that the existing record, even as supplemented, is insufficient or inadequate and that a full plenary hearing is necessary in order to render a fair and complete redetermination of registrant's tier classification and manner notification, the date of that hearing shall be set for no later than 14 days from the initial hearing date, unless circumstances warrant a relaxation of that time period. The conduct of the plenary hearing shall be governed by VIII above. The record developed by such a plenary hearing shall constitute the basis for redetermination.

XVII. In redetermination cases, where the original disposition was rendered after a conference or hearing, the judge's

final redetermination, whether based on a *de novo* hearing on the existing record or on the existing record as supplemented by non-testimonial and/or testimonial evidence, or based on a full plenary hearing, shall contain express findings of fact under the standard of clear and convincing evidence that support the judge's conclusion that the State either has or has not met its burden of persuasion both as to tier classification and manner of notification; such findings shall also be specifically included or expressly incorporated by reference in the final order.

XVIII. Subject to any applicable stay or injunctive order, all orders authorizing notification shall contain a provision that they do not become effective until the expiration of two full business days subsequent to the date of the execution of the order.